Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
ITC^DeltaCom Communications, Inc. Petition for Waiver of the Supplemental Order Clarification	)	DA 01-2030

OPPOSITION OF THE VERIZON TELEPHONE COMPANIES[1]

INTRODUCTION AND SUMMARY

In the *Fourth Further Notice*, the Commission is determining whether there are any circumstances under which competing carriers will be impaired absent the ability to substitute unbundled network elements for already competitive special access services. Because this proceeding is pending, the Commission has rejected requests to allow commingling of loops or loop-transport combinations with tariffed special access services in order to avoid prejudging its results. Instead, it has prescribed certain "safe harbors," under which commingling is not permitted, that allow carriers with significant amounts of local traffic to convert special access services to unbundled network elements. ITC^DeltaCom ("ITC") does not fit within these safe harbors, so it wants a waiver to allow it to convert special access services to unbundled network elements under circumstances where such conversions are barred by the Commission's prior orders. In doing so, ITC asks the Commission to create a new hybrid combination of unbundled

[1] The Verizon telephone companies ("Verizon") are the local exchange carriers affiliated with Verizon Communications Inc. listed in Attachment A.

network elements and access service that current incumbent carriers' operations are incapable of dealing with. Granting ITC's waiver request both would allow ITC to unjustifiably undermine competitive special access services and would prejudge the pending policy proceeding. Moreover, ITC has failed to prove the kind of "extraordinary circumstances" that are required for a waiver of the type ITC requests here. *Supplemental Order Clarification*, 15 FCC Rcd 9587, & 23 (2000). Its Petition should be denied.

ARGUMENT

The 1996 Act requires that, before it can require incumbent local exchange carriers to make unbundled network elements available to their competitors, the Commission must, "at a minimum," find that

> the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. ə 251(d)(2)(B). According to the Supreme Court, this language requires the Commission to apply "*some* limiting standard, rationally related to the goals of the Act." *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 336, 388 (1999) ("*Iowa Util. Bd.*"). At a minimum, a rational limiting standard must take into account availability of alternatives to the use of unbundled network elements – whether inside or outside the incumbent's network. And the Supreme Court made clear that a carrier that simply receives a reduced profit "has not *ipso facto* been 'impair[ed] … in its ability to provide the services it seeks to offer.'" *Id*. at 390. In the case of already competitive special access services where alternatives to the use of unbundled network elements are available, both in the form of services and facilities from other providers or self-supplied *and* in the form of competitively-priced facilities and services of others, this standard simply cannot be met.

Given the requirements imposed by the Act and the Supreme Court, the Commission is currently conducting a proceeding to determine whether there are any circumstances under which the impairment standard is met. That determination requires a "complete record in the Fourth FNPRM prior to determining whether IXCs may employ unbundled network elements solely to provide exchange access service." *Supplemental Order*, 15 FCC Rcd 1760, & 4 (1999). To that end, the Commission has solicited comments from the industry, which were filed earlier this year. *See* Comments Sought on the use of Unbundled Network Elements to Provide Exchange Access Service, 16 FCC Rcd 2261 (2001).

Pending completion of that proceeding, the Commission twice vowed to preserve the status quo and "not [to] prejudge any final resolution on whether unbundled network elements may be combined with tariffed services." *Supplemental Order Clarification*, at & 16. *See also Supplemental Order* at & 4 ("until resolution of our Fourth FNPRM, … IXCs may not convert special access services to combinations of unbundled loops and transport network elements"). Indeed, the Commission had no other course available to it, precisely because the statute does not permit the Commission to impose an unbundling requirement without first finding that the statutory standard is met.

To clarify the scope of this freeze, the Commission adopted three "safe harbors" under which a carrier that is providing a "significant amount of local exchange service" may convert special access to unbundled network elements. *Supplemental Order Clarification* at & 22.[2] The specific parameters of these safe harbors were proposed by a coalition of incumbent local

[2] The concept of a "safe harbor" when a carrier is providing a significant amount of local service was proposed by a coalition of incumbent local exchange carriers and their competitors. *See Supplemental Order* at n. 9. The *Supplemental Order Clarification* clarified what constitutes "a significant amount of local service."

exchange carriers and their competitors, who agreed that the limits they proposed and the Commission accepted were reasonable. *See id*. at n.22, citing a joint industry *ex parte* letter dated February 28, 2000. Each of the safe harbor options makes clear that it "does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services." *Id*. at & 22. To emphasize this restriction, the Commission "reject[ed] the suggestion that we eliminate the prohibition on 'co-mingling' (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above," because the Commission believed that such commingling would lead to "the use of unbundled network elements by IXCs solely or primarily to bypass special access services." *Id*. at & 28. The prohibition is hardly ambiguous, nor does it require any further interpretation. Until the Commission acts on the broader issue, commingling is flatly prohibited, for good policy reasons.

The Commission therefore took great pains to preserve the status quo and not to prejudge the issues in the Fourth Further Notice. Now, it has before it a substantial record from a large number of parties, including ITC, as to whether or not carriers would be impaired in their ability to provide access services if they were not permitted to use network elements for that purpose. And that record proves unequivocally that they would not.

As Verizon showed in its comments, the Commission cannot find that the statutory impairment standard is satisfied, because competitive alternatives are widely available both from incumbents and their competitors. First, Verizon documented in its comments that services and facilities are readily available from others, so that competing carriers have a multitude of competitive choices and are not dependent on the incumbent. For example, facility-based competitors already operate more than 600 fiber networks in the top 150 MSAs, many of which are served by several non-incumbent carriers. By year-end 2000, those providers had deployed

more than 200,000 local fiber miles, a 25% increase from the year earlier. *See* Comments of SBC and Verizon (filed Apr. 5, 2001) ("Comments"), Reply Comments of SBC Communications, Inc. and the Verizon Telephone Companies (filed Apr. 30, 2001) ("Reply Comments"). The Commission itself has found that, in many markets "it may be practical and economical for competitive LECs to compete using self-provisioned facilities." *UNE Remand Order*, 15 FCC Rcd 3696, & 54 (1999). *See, also id*. at ¶ 276 ("to the extent that the market shows that requesting carriers are generally providing service in particular situations with their own switches, we find this fact to be probative evidence that requesting carriers are not impaired without access to unbundled local circuit switching"). Of course, if they can self-provision their facilities, they cannot be impaired if unbundled network elements are unavailable from the incumbent.

Second, even beyond the competitive facilities, special access arrangements are readily available throughout the country from incumbent local exchange carriers. In the present waiver proceeding, ITC admits that it currently provides services to its customers through over 3000 special access arrangements obtained from the incumbent local exchange carrier, and never suggests that similar services are unavailable to service additional customers and additional geographical locations. Petition at 4. Relying on these facilities and other competitive alternatives, competitors have captured 36% of the special access market. *See* Comments at 5. Moreover, competitive providers have collocated in wire centers accounting for a majority of special access revenues. *See* Reply Comments at 5. As a result of that collocation, markets generating 80% of the former Bell Companies' special access revenues qualify for Phase I pricing flexibility, and markets generating nearly two-thirds of such revenues qualify for Phase II relief. *See* Reply Comments at 6.

Now, however, ITC is asking the Commission to ignore that ongoing proceeding to determine whether there are any circumstances under which the statutory requirement is met and, instead, give it a waiver to allow it to commingle special access services (*e.g.*, DS3 "entrance facilities"), unbundled loops, and DS1 loop/transport combinations, all without regard to the statutory impairment standard. Instead, ITC bases its claim entirely on its claim of "good cause" under section 1.3 of the rules and of "extraordinary circumstances" under paragraph 23 of the *Supplemental Order Clarification.* Petition at 4-5.

As an initial matter, the Commission *cannot* expand the scope of its unbundling requirements without first determining whether the statutory impairment standard is being met. As shown above, the Supreme Court found that the Act imposes a limiting standard on Commission-imposed unbundling requirements. While the Court's decision, and the language of the Act, leaves room for the FCC to decline to mandate unbundling for a reason other than lack of impairment, the Court could not have made clearer that the FCC could not mandate any additional unbundling if the statutorily defined tests are not satisfied.[3] Indeed, that was the basis for the Court's rejection of the Commission's earlier order. As the Court explained, "if Congress had wanted to give blanket access to incumbents' networks,… it would not have included э 251(d)(2) in the statute at all." *Iowa Util. Bd.*, 525 U.S. at 390.

In addition, even aside from the fact that the statutory prerequisite is not met, ITC has shown neither good cause nor extraordinary circumstances. Instead, just as is the case with the similar waiver request submitted by WorldCom, which is pending, ITC's request would allow it to undermine already competitive special access services and would prejudge the pending policy

[3] Section 251(d)(2) merely requires that the Commission evaluate impairment "at a minimum" leaving the Commission open to find other bases for limiting an unbundling requirement.

issue. *See* WorldCom, Petition for Waiver of the Supplemental Order Clarification Regarding UNE Combinations, DA 00-2131 (filed Sep. 12, 2000); Opposition of the Verizon Telephone Companies (filed Oct. 2, 2000); Reply of the Verizon Telephone Companies (filed Oct. 10, 2000).[4]

By its own admission, ITC has provided service through special access facilities since 1997 and currently provides service through more than 3000 special access circuits. Petition at 4. ITC claims, however, that it needs the ability to commingle in order to serve "smaller cities and other underserved communities." *Id*. at 5. This, it says, is because it is unlikely to have enough local customers in an end office to justify a DS3 interoffice transport facility. *Id*. at 6. However, ITC does not attempt to show why, under those circumstances, it cannot simply use one or more lower-speed interoffice facilities, such as DS1, instead of DS3. If, as ITC asserts, using a DS3 facility increases the risk of stranded investment, *id*., using a lower-capacity facility would reduce or eliminate that risk.

In addition, although ITC claims that, without commingling, it will not enter smaller markets and might withdraw from existing markets, it only says that, without the waiver, it would change its business plan to concentrate on large cities. Significantly, ITC does not attempt to show *why* it might change its plan and choose not to serve smaller ones. A bald statement that a carrier would change its business plan falls far short of a showing of extraordinary circumstances to support grant of a waiver.

---

[4] In addition, ITC's waiver request addresses principally entrance facilities, and the Commission in the Fourth Notice is asking "whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide entrance facilities and unbundled network element prices." *UNE Remand Order* at & 494. This is because entrance facilities may be competitive, so that a carrier needing those facilities has multiple sources and need not rely on the incumbent for them. Grant of the waiver to ITC would also prejudge this pending issue.

Nowhere in the waiver request does ITC assert that it would be *unable* to provide service in smaller communities in the absence of commingled facilities. Nor does ITC provide any figures whatsoever that could support a conclusion that the cost of providing service without commingling would exceed the ability of customers to pay. Instead, ITC simply argues that commingling is "[t]he most efficient and least risky way for ITC^DeltaCom to implement its business plan to serve customers in smaller cities and other underserved communities." *Id.* at 6. That is a far cry from a demonstration of need for commingling in order to serve these communities. It falls well short of the showing of "extraordinary circumstances" or even good cause that would support a waiver of the commingling prohibition. Moreover, as noted above, ITC acknowledges that it has been using access services in over 3000 network configurations to provide service to its customers since 1997. *Id.* at 4. Clearly the use of special access was not a deterrent for ITC to serve customers in those markets.

It is apparent, therefore, that the only reason ITC wants a waiver is that it wants to avoid installing its own facilities or obtaining them from special access providers – whether the incumbent or others – at market rates.[5] Instead, it wants a waiver to enable it to obtain the same capabilities at below-market TELRIC rates, thereby creating an arbitrage situation. Such a business decision falls far short of the required burden to support a waiver.

In contrast, grant of ITC's waiver request, and the ensuing expansion of unbundling requirements, would also undermine existing facilities-based providers and eliminate incentives for other carriers to deploy new facilities in the local exchange. ITC openly concedes that it seeks this waiver to allow it to enter new markets without any intent to construct new facilities.

[5] While ITC claims that it "will not" enter new markets without a waiver, Petition at 7, it is apparent that this is simply a business decision not to build its own facilities or obtain them at market rates, not because it is impaired from providing the services.

Petition at 7. Grant of the waiver would reward this business plan and undercut any other carrier that might otherwise deploy facilities in those markets.

ITC's Petition also raises operational issues, and granting the waiver would involve far more than a billing change. Under the current regime, Verizon and, presumably, other incumbent local exchange carriers, provide competing carriers with either unbundled network elements or access services, but not both in combination.

Verizon has no current way organizationally to manage and maintain these combinations. Consistent with the differences in the products, Verizon maintains separate organizations and responsibilities for servicing and maintaining each product. As a result, the ability to manage, maintain, and repair the facilities is very limited, and response times may be protracted. If a carrier uses an unbundled network element, that carrier undertakes testing and other "virtual network" responsibilities over that facility. By contrast, Verizon retains those responsibilities for its special access services, because it is providing the customer with an end-to-end service. Any service issues on a commingled circuit would have a gating problem of determining whether Verizon or the customer had responsibility. Nor can Verizon manage dynamic changes in the special access services and unbundled network elements that connect to DS3 services as the access and local needs of a carrier change from month-to-month.

In addition, a carrier reporting a problem on a DS1 unbundled loop or loop-transport combination would use the processes established for that purpose, while a carrier or customer reporting an access problem would use the access services process and trigger specific tariff terms and conditions if applicable. If the trouble was reported for an unbundled network element but was actually on the access service portion of the commingled circuit, there are no processes

for coordinating resolution of the trouble. This would lead to finger pointing and prolonged restoration times, to the detriment of the carrier and its own end users.[6]

Finally, from a billing perspective, Verizon has separate billing processes for access services and unbundled network elements. If the Commission were to allow a single DS-3 to be connected to both a network element and another special access service, Verizon could rely on neither its special access nor its network element billing programs, thereby complicating a process that is already difficult. Any system fix would be resource intensive and potentially expensive. These efforts should not be required while the Commission is deciding whether to allow commingling on a going-forward basis. Furthermore, the Commission should not rely on expanding the temporary billing work-around currently implemented to process credits for loop-transport combinations that do qualify under the interim "safe harbors" as an interim solution to the billing issues associated with commingling. Those work-arounds are manual processes designed for a limited number of orders. They are incapable of being significantly expanded. Accordingly, ITC's Petition should be denied.

Respectfully submitted,

/S/

Lawrence W. Katz
1515 North Court House Road
Suite 500
Arlington, Virginia 22201-2909
(703) 351-3071

Michael E. Glover
Edward Shakin
Of Counsel

[6] To the extent that Verizon does not have control over the trouble reporting and restoration process, it should not be held responsible for its performance in resolving the troubles.

Attorney for the Verizon
telephone companies

September 18, 2001

ATTACHMENT A

THE VERIZON TELEPHONE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.